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IN THE

Supreme Court of the United States

Term, 19

No. 74-819

LEON PITTMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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LEON PITTMAN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on October 30, 1974, which affirmed the District Court's judgment.

Opinions Below

The District Court for the Western District of Pennsylvania denied Petitioner's Motion to Suppress the Evidence by opinion (Appendix pp. 7-11). This opinion is also reported at *United States v. Pittman*, 372 Fed. Sup. 561 (W.D. Pa. 1974). The Third Circuit Court of Appeals affirmed by order (Appendix pp. 12-13).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Was there probable cause for Petitioner's warrantless arrest and search of his person incident to that arrest.

Statement

Petitioner, LEON PITTMAN, was convicted in a non-jury trial of unlawfully possessing 7.40 grams of heroin with intent to distribute in violation of 21 U.S.C. § 841 (a) (1) (App. p. 117a). A co-defendant, ROSEMARY ENGLEMAN, was acquitted of the same charge. Pittman's Pretrial Motion to Suppress the Evidence earlier having been denied after hearing, Pittman was then sentenced to a five year indeterminate period of imprisonment and as a second offender, given a special parole term of six years pursuant to 21 U.S.C. § 841 (b) (1) (A). Pittman took a direct appeal from the sentence asserting error in denial of the Motion to Suppress and insufficient evidence that his possession of heroin was with the intent to distribute. The Third Circuit affirmed by simple order.

Pittman was arrested on December 11, 1973 and pursuant to a search incident to that arrest without a warrant, sixteen half-spoon packages of heroin were seized from his coat pocket and one-half spoon of heroin from his shirt pocket, together totalling the 7.40 grams for which Pittman was convicted. The probable cause for the arrest without the warrant resulted from a fortuitous encounter between Pittman and Detective Edward Costanzo, an Allegheny County Narcotics investigator. Costanzo, together with federal

and state agents, were engaged in surveillance of "Big Dave's" Bar in the "Hill District" of the City of Pittsburgh, an area several miles square. The surveillance was being conducted with a view to arresting two persons whom the Government concedes were not Pittman or the acquitted co-defendant, Engleman (App. pp. 14a-15a). While in his car parked across the street from "Big Dave's", Costanzo observed Pittman and Engleman, drive up and park Pittman's car in front of him (App. pp. 15a-16a). Having been a narcotics investigator for over nine years, Costanzo testified that from personal knowledge he then knew that Pittman had been convicted of a federal narcotics violation in 1965 and that he had a reputation for holding and distributing drugs. Moreover, Costanzo also knew that the area within which the surveillance was taking place was notorious for drug trafficking (App. pp. 10a, 11a, 13a). Costanzo further testified that he had received reports from reliable informants over a six year period that Pittman was engaged in distributing narcotics (App. pp. 11a, 13a), and that two of these reliable informants had provided information within the last week that Pittman was holding and distributing narcotics somewhere between the Upper and Lower "Hill District" section of the City of Pittsburgh, an area previously indicated as being several miles square (App. pp. 12a, 13a). Pittman and Engleman exited the car and as they were crossing the street, Costanzo observed Pittman give Engleman an amount of paper money (App. pp. 15a-16a). Engleman went into "Big Dave's" Bar while Pittman waited at a nearby jitney station. Engleman emerged from the bar within a minute or so, went directly to the jitney station where Pittman was waiting and the two returned to Pittman's car and drove off. On the basis of his belief that he had observed a purchase of narcotics through the use of an intermediary (Engleman), Costanzo followed

Pittman's car a short distance, pulled it over and arrested both him and Engleman. A search of Pittman incident to that arrest revealed the small packages of heroin which were the basis of the indictment and the Motion to Suppress.

Reasons for Granting the Writ

There was no probable cause for the warrantless arrest of Pittman. Indeed, the District Court itself allowed that the "question [probable cause] is not free from doubt . . ." In its brief to the Third Circuit, the Government conceded that Costanzo's information from two informants, that Pittman was holding and distributing narcotics in the vicinity of a "Hill District" bar did not meet the underlying circumstances test of *Aguilar v. Texas*, 378 U.S. 108 (1964). Nor was Costanzo's information from alleged reliable informants over a six year period that Pittman was holding and distributing narcotics any more significant, and for the same reason. Moreover, at best, the informants' information that defendant was distributing narcotics in the vicinity of a "Hill District" bar in an area spanning several miles square did not provide any more than a suspicious basis for believing that "Big Dave's" Bar was *the* bar where such sales were being made. Although Costanzo was entitled to consider Pittman's prior conviction and reputation in determining the existence of probable cause to arrest, *United States v. Harris*, 403 U.S. 573, 582-583 (1971) together with information received from the Drug Enforcement Agency that narcotics were generally being sold at "Big Dave's" (App. pp. 26a-27a), Pittman's observed conduct, of itself, was manifestly innocent and insufficiently suspicious to justify a belief that he was then committing an offense. *United States v. Moody*, 485 F.2d 531, 534 (3rd Cir. 1973).

The Government's evidence indisputably shows that the only exchange observed was that of Pittman giving Engleman some paper money to go into the bar. At the hearing, on the Motion to Suppress, Engleman testified that said money was for the purpose of purchasing cigarettes, and indeed, two packs of unopened cigarettes were found on Engleman's person at the time of her arrest. In any event, respected courts have held that observation of conduct that is otherwise ambiguous, even in a heavy narcotics traffic area and with knowledge that the individual observed is known to be a narcotics trafficker, is insufficient to make out a case of probable cause. *Remers v. Superior Court of Alameda County*, 2 Cal. 3d 659, 87 Cal. Rptr. 202, 470 P.2d 11 (1970); *cf. Cunha v. Superior Court of Alameda County*, 2 Cal. 3d 352, 85 Cal. Rptr. 160, 466 P.2d 704 (1970). Similarly, in *People v. Brown*, 24 N.Y.2d 421, 301 N.Y.S.2d 18, 248 N.E.2d 867 (1969), the New York Court of Appeals found no probable cause where police observed defendant in the company of a narcotics addict and in a known narcotics trafficking area, and then observed the addict return from a building, join the defendant and exchange certain material. That Court concluded:

> "Although the observed acts of the defendant and the suspected narcotic addict were not inconsistent with the culpable narcotics transaction, they were also susceptible of many innocent interpretations even between persons with a narcotics background. The behavior at most 'equivocal and suspicious' was not supplemented by any additional behavior raising 'the level of inference from suspicion to probable cause'." *Id.*, 24 N.Y.2d at 423, 301 N.Y.S.2d at 20, 248 N.E.2d 868.

As the Court in *Brown, supra*, recounted there was no recurring pattern of conduct which would negate inferences of innocent activity, (*cf. People v. Smith*, 21 N.Y.2d 698,

234 N.E.2d 460); nor any overheard conversation between the suspects that might clarify the acts observed (*cf. People v. Cohen*, 23 N.Y.2d 674, 243 N.E.2d 146); nor flight at the approach of an officer (*cf. People v. White*, 16 N.Y.2d 270, 213 N.E.2d 438); nor any misstatements when questioned with respect to the observed activity (*cf. People v. Brady*, 16 N.Y.2d 186, 211 N.E.2d 815). Pittman's conduct and that of Engleman were consistent with cigarette purchase, telephone call or any of a number of other plausible explanations. Moreover, there was no evidence whatever of any two way exchange as existed in *Peterkin v. United States*, 281 A.2d 561 (D.C. App. 1971), cert. denied, 406 U.S. 922. See also *Vicks v. United States*, 310 A.2d 247 (D.C. App. 1973). At most, Costanzo would have had a basis to be suspicious and to stop and further investigate as permitted by *Terry v. Ohio*, 392 U.S. 21; *cf. U.S. v. Santana*, 485 F.2d 365 (2nd Cir. 1973).

The arrest without probable cause would invalidate the search incident to it and any seizure would, of course, be in violation of Pittman's Fourth Amendment rights

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectively submitted,

STANLEY W. GREENFIELD,
Attorney for Petitioner.

Certificate of Service should show service to the Solicitor General of the United States.

Opinion and Order

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

LEON PITTMAN and ROSEMARY PATRICIA ENGLEMAN.

Criminal No. 74-027.

MARSH, *Chief Judge*.

The defendants, Leon Pittman and Rosemary Patricia Engleman, charged in a one-count indictment with unlawfully possessing 7.40 grams of heroin with the intent to distribute it, 21 U.S.C. § 841(a)(1), and aiding and abetting, 18 U.S.C. § 2, have moved to suppress evidence seized by the officers at the time of their warrantless arrests on December 11, 1973. An evidentiary hearing was held. It appears that the defendants contend that their arrests were illegal because not based upon probable cause, and, therefore, the subsequent search of their persons was illegal, and the seized evidence should be suppressed. While the question is not free from doubt, in our opinion the motion should be denied.

At approximately 8:50 o'clock p.m., on December 11, 1973, Detective Sergeant Edward Costanzo, a nine-year veteran detective in the field of narcotics enforcement,[1] along with

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[1]Sergeant Costanzo is presently with the newly-formed Allegheny County Regional Narcotics Task Force and had previously been with the Allegheny County Narcotics Squad from 1964 to 1973.

five agents of the Federal Drug Enforcement Administration and two local detectives, began a surveillance of "Big Dave's Bar"[2] located in the Hill District in the City of Pittsburgh. This surveillance was based upon information received from the Federal Drug Enforcement Administration (D.E.A.), a presumptively reliable source,[3] that "Big Dave's" was being used on that day as a narcotics distribution point by two unknown individuals. The source of the D.E.A.'s information concerning "Big Dave's" being used as a distribution center on that day was not challenged at the hearing. The Sergeant testified that the area around "Big Dave's" had been a notorious rendezvous point for narcotics dealers, including Pittman, "where all the drug traffic took place" (Tr., p. 6).

Sergeant Costanzo's surveillance post was in his car parked across the street from "Big Dave's". At approximately 9:00 o'clock p.m., the defendants pulled up in a car driven by Pittman, parked directly in front of Sergeant Costanzo's car, exited their car, and began to cross the street in the direction of "Big Dave's". While they were crossing the street Sergeant Costanzo observed Pittman hand an amount of currency to Engleman. The two defendants then split up, with Pittman going to a nearby jitney station[4] and Engleman entering "Big Dave's". After ap-

[2] "Big Dave's Bar" was also known as the "88" Bar, Art's Bar, and the Ambassador.

[3] United States v. Ventresca, 380 U.S. 102, 111 (1965); Brooks v. United States, 413 F.2d 1011, 1019 (5th Cir. 1969).

[4] Jitneys are private vehicles which carry passengers for a fare in the City of Pittsburgh. The jitney station was on the same side of the street as "Big Dave's" and two doors away. Both defendants arrived in a car driven by Pittman and left the same way. Obviously, since Pittman, the driver, passed money to Engleman, the passenger, it would not be reasonable to presume that Pittman was merely a jitney driver dropping off a fare and returning to the station.

proximately one minute Engleman emerged from "Big Dave's", went directly to the jitney station, entered, and, shortly thereafter, both defendants left the jitney station, returned to their car and drove off.

Detective Costanzo recognized Pittman, whom he had known for six or seven years. He knew Pittman had been convicted of a federal narcotic violation in 1965, and upon information received from numerous informants over a period of six or seven years, was aware that Pittman had a reputation of being a narcotics dealer and a former user. Furthermore, within two days to a week before December 11, 1973, Sergeant Costanzo had received information from two separate reliable informants, who had previously given information resulting in 15 to 20 arrests and convictions, to the effect that Pittman was actively engaged in holding and distributing narcotics.

Based on the above facts and after seeing Pittman give money to Engleman, he concluded that the former had purchased narcotics via an intermediary (Engleman) from the unknown distributors in "Big Dave's Bar". Thus, when the defendants drove away, Sergeant Costanzo followed them a short distance, stopped their car, arrested both for violation of the narcotics laws and, in searching them incident to their arrests, found 16 packets, each containing a half-spoon dose of heroin, on Pittman.

We believe Pittman's arrest and search were valid. The information received by Sergeant Costanzo from two separate reliable informants and from the D.E.A., while not revealing the basis for the informants' conclusions, was to some degree corroborated by his own knowledge of Pittman's past reputation and conviction as a trafficker in narcotics. Moreover, before Sergeant Costanzo arrested Pittman he had observed him near a known rendezvous point

for narcotics distribution, had seen him pass money to Engleman who then went into the distribution point to apparently purchase something for Pittman while he waited a safe distance away at the jitney station, and had observed both defendants leave the vicinity shortly after Engleman had completed her business in "Big Dave's". The conduct of Pittman and Engleman centering around "Big Dave's" was sufficiently suspicious and unusual[5] that, when added to the information from Sergeant Costanzo's reliable confidential sources, the information from the D.E.A., and his personal knowledge about Pittman, and considering the information from all these independent sources together, Sergeant Costanzo had adequate probable cause on which to arrest Pittman and Engleman. *United States v. Lampkin*, 464 F. 2d 1093 (3d Cir. 1972). *Cf. United States v. Moody*, 485 F. 2d 531 (3d Cir. 1973), citing *United States v. McNally*, 473 F. 2d 934, 939-940 (3d Cir. 1973); *Bailey v. United States*, 386 F. 2d 1, 2 (5th Cir. 1967). We believe that what was said in *United States v. McNally, supra*, p. 943, is equally applicable here:

> "To require suppression in this case would be to deny common sense and shift the fulcrum of the scale in favor of one offender and against society. Such a shift, though in the short run perhaps a defeat of authority, would be no gain for liberty."

The original arrest of Pittman being valid, there is no question that the subsequent search was likewise valid. *United States v. Robinson*, ____ U.S. ____ (12/11/73); *Gustafson v. Florida*, ____ U.S. ____ (12/11/73).

An appropriate order will be entered.

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[5] It is well known that intermediaries are extensively used in the pickup and delivery of narcotics so that the real purchaser can maintain a low silhouette. The conduct of the defendants outside of "Big Dave's" could aptly be categorized as a classic narcotics pickup.

ORDER OF COURT

AND Now, to-wit, this 27th day of March 1974, the defendants, Leon Pittman and Rosemary Patric a Engleman, having filed a motion to suppress evidence in the above entitled case, and after an evidentiary hearing, argument, and due consideration of the briefs submitted, IT IS ORDERED, ADJUDGED AND DECREED that said motion be and the same hereby is denied.

.....,
United States District Judge.

cc: Charles F. Scarlata,
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Pittsburgh, Pa. 15219.

Morris F. Cohen, Esq.,
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Pittsburgh, Pa. 15219.

Judgment Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1546

UNITED STATES OF AMERICA,

v.

LEON PITTMAN and ROSEMARY PATRICIA ENGLEMAN, LEON PITTMAN,

Appellant.

Appeal from the United States District Court for the Western District of Pennsylvania (Criminal No. 74-027.)

Submitted Under Third Circuit Rule 12(6)

October 29, 1974.

Before: Staley, Aldisert and Rosenn, *Circuit Judges.*

After considering the contentions raised by appellant, to-wit, that the court erred in finding: (1) that there was probable cause to arrest appellant, and (2) that appellant intended to distribute heroin: it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
RUGGERO J. ALDISERT,
Circuit Judge.

ATTEST:
THOMAS F. QUINN,
Clerk.

Dated: Oct 30 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-819

LEON PITTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), and to a six-year special parole term. The court of appeals affirmed (Pet. App. 12-13). Petitioner contends that there was no probable cause for his arrest and therefore that the heroin discovered on his person during the course of the search incident to his arrest should not have been admitted in evidence at trial.

The facts are set forth in the opinion of the district court denying petitioner's motion to suppress (Pet. App. 7-9; 372 F. Supp. 561, 562). On the evening of December 11, 1973, Sergeant Edward S. Costanza, Agent James Tielsch,

and other state law enforcement officials and agents of the Federal Drug Enforcement Administration, began a surveillance of "Big Dave's" bar in the Hill District of Pittsburgh. This surveillance was based on information received from the federal agency that the bar was being used as a narcotics distribution point (Tr. 4-5; M. Tr. 5-7).[1]

While Sergeant Costanza was conducting this surveillance, petitioner drove up and parked his automobile directly in front of Costanza's vehicle. During the preceding week Costanza received information from two reliable informants that petitioner was actively engaged in distributing narcotics;[2] he also knew that petitioner had been convicted of a federal narcotics violation in 1964 and that he had the reputation of being a narcotics dealer (M. Tr. 3-6, 24-26).

Costanza watched petitioner and his companion, Rosemary Engleman, leave petitioner's car and cross the street toward the bar (Tr. 6-7, 49; M. Tr. 8-9). While they were crossing the street, petitioner gave some currency to Engleman. Petitioner then recrossed the street away from the bar and entered a jitney station, while Engleman entered the bar (Tr. 7-9, 49-50; M. Tr. 9). Engleman remained in the bar a short period of time; when she left the bar she walked over to the jitney station (Tr. 9, 50; M. Tr. 10). Shortly thereafter, she and petitioner left the station, entered the car, and drove off (Tr. 9-10, 50; M. Tr. 10).

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[1]"Tr." refers to the transcript of the proceedings at trial; "M. Tr." refers to the transcript of the hearing on the motion to suppress.

[2]The information given by those informants in the past had resulted in several arrests and convictions (Pet. App. 9).

Costanza followed petitioner's automobile for a short distance, stopped the car, and arrested both petitioner and Engleman (Tr. 10, 50; M. Tr. 10-11). Sixteen half-spoons of heroin were discovered on petitioner's person during the course of the search incident to his arrest; the heroin weighed 7.40 grams and had a street value of about $400 (Tr. 10-11, 31, 35-36; M. Tr. 11).[3]

The district court correctly found probable cause to arrest petitioner in an opinion upon which we rely (Pet. App. 9-10):

> * * * The information received by Sergeant Costanzo [*sic*] from two separate reliable informants and from the D.E.A., while not revealing the basis for the informant's conclusions, was to some degree corroborated by his own knowledge of Pittman's past reputation and conviction as a trafficker in narcotics. Moreover, before Sergeant Costanzo [*sic*] arrested Pittman he had observed him near a known rendezvous point for narcotics distribution, had seen him pass money to Engleman who then went into the distribution point to apparently purchase something for Pittman while he waited a safe distance away at the jitney station, and had observed both defendants leave the vicinity shortly after Engleman had completed her business in "Big Dave's". The conduct of Pittman and Engleman centering around "Big Dave's" was sufficiently suspicious and unusual that, when added to the information from Sergeant

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[3]Petitioner testified on his own behalf at trial (Tr. 56-72). He claimed that the heroin found on his person was for his personal use and that the money that passed between him and Engleman was change for cigarettes (Tr. 58-60). He denied intending to sell or having sold any heroin (Tr. 60). He admitted to a prior conviction for selling heroin (Tr. 69-70).

> Costanzo's [*sic*] reliable confidential sources, the information from the D.E.A., and his personal knowledge about Pittman, and considering the information from all these sources together, Sergeant Costanzo [*sic*] had adequate probable cause on which to arrest Pittman and Engleman.[4]

Since petitioner's arrest was valid, the subsequent search was also. Accordingly, the evidence discovered in the course of that search was admissible at trial. *United States* v. *Robinson,* 414 U.S. 218, 227-229; *Gustafson* v. *Florida,* 414 U.S. 260, 263-266.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,

Solicitor General.

FEBRUARY 1975.

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[4]Petitioner's contention that the government conceded in its court of appeals brief that the information from the two informants was insufficient to meet the underlying circumstances test of *Aguilar* v. *Texas,* 378 U.S. 108, is misleading. The statement in that brief was as follows (Br. 7-8):

> * * * [W]hile the record does not show that the information [Costanza] had received from his two informants met the underlying circumstances test of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), this information was corroborated by the defendant's appearance in the vicinity of "Big Dave's" bar, as well as by the information Sergeant Costanza received from the D.E.A. concerning narcotics being sold at "Big Dave's." We submit that this independent corroboration of the informant information was sufficient to elevate it to the level required by *Aguilar, supra.*